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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL DICKEY

Defendant and Appellant.

G041417

(Super. Ct. No. 08HF1518)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory W. Jones, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Richard de la Sota, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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Defendant Daniel Dickey was charged with the sale or transportation of ecstasy (Health & Saf. Code, § 11379 subd. (a)) and with possession of ecstasy for the purpose sale (Health & Saf. Code, § 11378). Defendant pled guilty to the charges and was sentenced to state prison for two years.

We appointed counsel to represent defendant on appeal. Counsel filed a brief which set forth the facts of the case. Counsel did not argue against the client, but advised the court no issues were found to argue on defendant's behalf. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was given 30 days to file written argument on defendant's own behalf. That period has passed, and we have received no communication from defendant.

Defendant and codefendant Charles Heard were pulled over for a traffic violation by the Newport Beach Police. Defendant had been driving with a suspended license and consented to a search of the vehicle. The officers discovered methylenedioxymethamphetamine (MDMA) 10,142 pills in the trunk and 67 MDMA pills and .6 grams of MDMA powder in the passenger compartment. Defendant initially denied knowing of the pills' presence, before later admitting he and codefendant knew of and intended to sell the MDMA pills.

Defendant pled guilty to the charges and in return was promised a sentence of no more than the low term of two years and that the court would consider his application for probation. The factual basis for his plea states: "In Orange County, California, on 8/8/08 I willfully & unlawfully transported and possessed for sale more than 10,000 MDMA (methylenedioxymethamphetamine) pills with the intent to sell such, knowing that the pills were a controlled substance."

Defendant was later sentenced to the low term of two years and his application for probation was denied. He also asked the court to consider submitting him to a diagnostic study pursuant to Penal Code section 1203.03 and was denied.

In accordance with *Anders v. State of California* (1967) 386 U.S. 738, defendant raises a number of issues that might arguably support the appeal. He asks whether or not his sentence is in accord with his guilty plea, whether or not the trial court abused its discretion by denying probation and his request for a diagnostic study, and whether or not a certificate of probable cause is required in this instance.

The Plea and Sentence

“Under long and well-established principles, a trial court is obligated to advise a defendant of the direct consequences of a plea of guilty or no contest to a felony or misdemeanor before it takes the plea. [Citations.]” (*People v. Zaidi* (2007) 147 Cal.App.4th 1470, 1481.) A plea in a felony case cannot be accepted without an affirmative showing that it was intelligent and voluntary. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242.) Before *Boykin*, “it was well established that a valid guilty plea presupposed a voluntary and intelligent waiver of the defendant’s constitutional trial rights, which include the privilege against self-incrimination, the right to trial by jury, and the right to confront one’s accusers. [Citations.] The new question that the high court addressed in *Boykin* was whether it was permissible to infer such a waiver from a silent record.” (*People v. Howard* (1992) 1 Cal.4th 1132, 1175-1176.)

The defendant in *In re Tahl* (1969) 1 Cal.3d 122, 124 contended the trial court failed to inform him of the nature and consequences of his guilty plea, and that he at no time expressly waived his right to a jury trial or any other constitutional right. The California Supreme Court rejected his argument and explained: “[R]ather than simply

presuming from the presence of counsel that petitioner had been informed of his rights, the court specifically ascertained from petitioner that he had in fact conferred with counsel as to his rights and the nature of his plea to the charge.” (*Id.* at p. 129, fn. omitted.) “[E]ach of the three rights mentioned—self-incrimination, confrontation, and jury trial—must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea.” (*Id.* at p. 132.)

“[W]e emphasize that explicit admonitions and waivers are still required in this state. We also reaffirm our caveat in *Tahl* that trial courts ‘would be well advised to err on the side of caution and employ the time necessary to explain adequately and to obtain express waivers of the rights involved. At stake is the protection of both the accused and the People, the latter by the assurance that an otherwise sound conviction will not fall due to an inadequate record.’ [Citation.]” (*People v. Howard, supra*, 1 Cal.4th at p. 1179.)

In this case, the trial court thoroughly inquired of defendant before making the finding defendant knowingly and voluntarily waived his constitutional rights. The court’s inquiry did not begin until after defendant read and signed the guilty plea form after his initials were placed next to each of his rights. The court ascertained defendant went over the contents of the form with his lawyer. Besides finding no one had promised him anything other than “what’s on the forms to try and persuade [him] to plead guilty against [his] wishes,” the court went over each of defendant’s constitutional rights and asked whether or not defendant understood them. Defendant said he did. The court found defendant waived his rights. At that point, the court made its finding defendant intelligently and voluntarily waived his constitutional rights, and found there was a factual basis for the plea. We find the record reflects defendant knowingly and voluntarily waived his constitutional rights when he pleaded guilty.

Defendant was sentenced to the low term of two years, consistent with this agreement. We find no error.

Probation

The guilty plea form states: “Defendant to plead guilty to above charged offenses with a 2 year lid. Sentencing to be continued for probation to prepare preplea report. Defendant may be sentenced to probation based on preplea. Defendant will not be sentenced to more than 2 years based on report.”

At the sentencing hearing, the court stated: “I have read and reviewed the probation report prepared by department probation officer Helene Fowler. I have even reviewed and read the attachments to that report.” The court later stated: “I just don’t believe this is an appropriate case for a probation grant. 10,000 pills of ecstasy going out into the public and into the hands of, for the most part, teenagers is spreading an awful lot of pain and hurt around the world. [¶] . . . [¶] And this was done, it would appear, by Mr. Dickey solely for the purposes of financial gain.”

A grant of probation is an act of judicial clemency, not a matter of right. (*People v. Johnson* (1993) 20 Cal.App.4th 106, 109.) “‘The grant or denial of probation is within the trial court’s discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]’ [Citation.] ‘In reviewing [a trial court’s determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court’s order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.’ [Citation.]” (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.)

The court made no assurances that probation would be granted, only that it would consider it. The record shows the court did indeed consider, and decided against, granting probation. Under the circumstances in this record, we cannot conclude the court abused its discretion.

Diagnostic Study

The day after defendant was sentenced, he returned to court and requested that he be sent up to state prison for a diagnostic study and report pursuant to Penal Code section 1203.03. The court denied his request.

A court's decision to grant or deny a request for a diagnostic study is reviewed for abuse of discretion. (*People v. Harris* (1977) 73 Cal.App.3d 76, 85.) Under the situation here, where the record reflects the court was thoroughly familiar with the overall circumstances and the probation report, we can find no abuse of discretion.

Certificate of Probable Cause

Penal Code Section 1237.5 provides that “[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] . . . [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.” (Pen. Code § 1237.5.)

Generally, a certificate of probable cause is required to file an appeal following a guilty plea. (Pen. Code, § 1237.5.) This requirement does not apply, however, when the appeal is based on “[g]rounds that arose after entry of the plea and do not affect the plea’s validity.” (Cal. Rules of Court, rule 8.304(b)(4)(B).)

We have reviewed this record and find no other arguable issues. Therefore, we find it unnecessary to decide whether or not a certificate of probable cause is required in this instance.

The judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.